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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/880,199	06/13/2001	Cornelis Theodorus Verrips	F7544(V)	6098

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UNILEVER
PATENT DEPARTMENT
45 RIVER ROAD
EDGEWATER, NJ 07020

EXAMINER

HENDRICKS, KEITH D

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 01/16/2003

8

Please find below and/or attached an Office communication concerning this application or proceeding.

mx-8

Office Action Summary	Application No.	Applicant(s)	
	09/880,199	VERRIPS, CORNELIS THEODORUS	
	Examiner	Art Unit	
	Keith Hendricks	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 25 October 2002.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1 and 5-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1 and 5-20 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1 and 5-20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The phrase "health-active", as it now appears in all such claims, remains indefinite. At page 6 of the response, applicants state that the phrase "is defined on page 6, lines 1 and 2 as 'probiotics which have been rendered non-viable'." This is not deemed persuasive for the reasons of record. Initially, it is noted that, for example, claim 1 already states that the bacteria are "non-viable", and thus the necessity of the phrase "health-active", is unclear. This means that the language of claim 1, would, in effect, read "...non-viable probiotics which have been rendered non-viable...". It is unclear as to what this adds to the claimed invention, or how this further limits the claimed invention. If this is the definition applicants wish to utilize, it is strongly suggested that applicants use this precise language in the claims, in order to more clearly define the invention, and to maintain continuity with the language used therein. It is unclear as to the necessity of the phrase "health-active", if applicants wish to define the claim in terms which are (a) known and accepted in the art, and (b) already used in the claim. Again, it is unclear in what organism the bacteria are to be active, and to what effect, such that they would be considered "health-active." Finally, it is noted that the term "health-active" is not readily known or accepted in the art, and is not readily, directly and clearly associated with the definition to which applicants refer. Thus, the use of this phrase may be repugnant to the art-accepted understanding of probiotic bacteria "which have been rendered non-viable."

Claim 6, and new claim 19, are indefinite for the recitation of the following terms: "meal replacers", "snacks", "other bakery products", "sweets", and "bars." At page 5 of the response, applicants state that "one of ordinary skill would be able to determine what 'sweets,' 'bars,' and bakery products, etc. are." This is not deemed persuasive for the reasons of record. Initially, there is an improper overlap between various terms within the claim, thus rendering the claim indefinite. For example, the terms "ice cream", "bars", "chewing gum" and "chocolate" are also encompassed by the term "sweets". The phrase

Art Unit: 1761

"bars" may apply to many of the recited elements, including "cereals", "sweets", "chocolate", and "ice-cream." The term "other bakery products" fails to provide a definite set of elements which are encompassed by this phrase. Further, it is unclear over what elements this phrase is defined, i.e. "other" than an undisclosed set of elements. For example, it is unclear if "snacks" would be considered a bakery product, a sweet, a bar, etc. Thus and again, the metes and bounds of the claimed invention are not clear, as it is unclear as to what is (and is not) encompassed by these terms. These terms are generally broad and non-specific to any particular type of food product, such that one skilled in the art would not be apprised of the scope of the invention.

NEW REJECTION:

Claim 19 is indefinite, as it recites an improper Markush-type list of optional foodstuffs. The term "and" should be inserted between "dairy products" and "dietetic products" in the last line of the claim, in order to conform with the closed-set language used in the claim.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 5-8, 10-14 and 16-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Hutkins et al. (US PAT 5,186,962, of record). The reference and rejection are taken as cited in a previous Office action.

Applicant's arguments filed October 25, 2002, have been fully considered but they are not persuasive. At page 7 of the response, first full paragraph, applicants argue that the reference teaches that "fermentation of the lactic acid bacteria can be prevented by modifying the bacteria so that it is rendered incapable of significantly fermenting the substrate... or that unmodified bacterial cells can be used." However, at the very next paragraph, applicants state that "this does not disclose, or mean, that the bacteria of Hutkins are non-viable bacteria as recited in the claims of the present invention." It is unclear to the Examiner as to the difference applicant intends.

Art Unit: 1761

Further, the reference is not solely limited in its methods, to subjecting the foodstuffs to "conditions which inhibit bacterial growth or fermentation", as applicants purport. This has been stated of record in the previous Office action. Further, it is noted that several of applicants' claims (see claim 7, for example) encompass this process, by the phrase "followed by rendering viable bacteria non-viable."

Still further, applicants' statement that "the Office points to no teaching that the bacteria of Hutkins are non-viable as presently recited." This is not deemed persuasive for the reasons of record, specifically, the statement that the reference provides the addition to foodstuffs of "live cells of non-fermenting and/or non-growing lactic acid bacteria." These "live cells of non-fermenting and/or non-growing lactic acid bacteria" are "non-viable" bacteria, as instantly claimed.

Regarding new claims 16-17, the amounts of bacteria added and present in the foodstuff, are specifically addressed at column 8, lines 26-45. Amounts of from 10^3 to 10^9 CFU per gram are added, thus being encompassed by the instantly-claimed " 10^6 to 10^{11} per serving [undisclosed amount] or per 100g of product." Regarding the amount present, it is stated that "it is preferred that the cell count of the population of lactic acid bacteria in the food mixture does not increase by more than about 10-100%."

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.



KEITH HENDRICKS
PRIMARY EXAMINER